92-1705

Supreme Court, U.S.
FILED
DEC 8 1992
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

SUSAN H. MALONEY,

Petitioner

v.

JOSEPH SALAFIA, ET AL

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI
AN APPENDIX

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QUESTIONS PRESENTED

1. May the court of Appeals affirm the Motion to dismiss by the District Court based on matters outside the the complaint without benefit of discovery enlight of the recent court ruling March 3, 1993, (**Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit**, No. 91-1657) Page 4205 ?

2. May the court of appeals affirm a motion to dismiss and not address vital arguments raised by the appellant when those same arguments have succeeded in numerous cases throughout the Circuits, thereby denying the appellant her due process rights under the fourteenth amendment

of the Constitution of the United States?

3. May the court of appeals ignore and or erase all material authority and contradict correct legal principles set forth in previous recent decisions concerning dismissal of an action where:

   (a) The court of appeals order comes from supposition rather than fact, (the courts presumption that the appellant had prior knowledge of the deprivation done by defendant Salafia is without a scintilla of evidence to support it);

   (b) The court of appeals is in error by affirming the lower courts

denial of the appellant's right of discovery;

(c) The court of appeals has not stated any findings of fact or conclusions of law regarding whether or not the dismissal of the instant action was proper?

4. May the court of appeals affirm dismissal of an action and refuse to decide a point of law determinative of the appellant's property rights where fraud and fraudulent concealment is clearly shown on the part of the defendants, thereby denying the appellant her due process rights under the fourteenth amendment of the Constitution of the United States?

5. May the court of appeals refuse to articulate and/or clarify its decision so as to demonstrate that the court has not ignored or misunderstood any material authority and/or facts put before it?
6. May the court of appeals use a technicality to dismiss an action at the pleading stage when fraud had been clearly proved? Thus allowing a wrong to go unanswered and the fraud and silence to continue.
7. May the Court of Appeals blatently show prejudice against a appellant ergo denying such appellant her due process rights under the fourteenth amendment of the Constitution of the United States?

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JURISDICTION

The judgment of the Court of Appeals was entered on June 30, 1992. A timely Petition for Rehearing was denied on September 9, 1992. The Court of Appeals twice refused to answer a Motion of Articulation and Clarification of their decision last entering Court October 8, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment XIV, Section 1 to the Constitution of the United States of America:

> No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

State of Connecticut Statute Sec. 47-1. Land and Land Titles.

Sec. 47-1. Fee simple an absolute property. Colonial grants valid. Each proprietor in fee simple of lands has an absolute and direct dominion and property in the same, and all patents and grants of lands from the general assembly of the colony of Connecticut, pursuant to the charter of Charles II, shall be sufficient evidence of a title in fee simple to the grantees, their heirs, successors and assigns forever.

State of Connecticut Statute of Limitations Annot. $52-595.
Fraudulent concealment of cause of action

If any person, liable to an action by another, fraudulently conceals from him the existence of the cause of such action, such cause of action shall be deemed to accrue against such person so liable therefor at the time when the person entitled to sue thereon first discovers its existence. (1949 Rev., 8335.)

STATEMENT OF THE CASE

Petitioner Susan H. Maloney, heir at law to her mother, Anita L. Maloney, now deceased, and sole owner of legal title to property located at 60 Park Place, Meriden, Connecticut.

It was well know to all parties that in 1982 said property came under a cloud of dispute. It is also well known that once there is a claim of disputed title to property it must be dealt with by law. And as stated by law, disputed titles can only be determined in a court of competent jurisdiction. The question of title must be dealt with first and resolved before all else. But in this instance that was not the case. Instead,

to cover up the unclear title to said property, numerous wrongs were committed.

Point in fact: One, a violation of the Petitioners civil rights resulting from a wrongful seizure of her property by a Connecticut sheriff (Joseph Salafia) who fraudulently concealed this wrong. At the time of the seizure, the petitioner was in possession of said property with an inherent right to title as an heir at law to the sole owner of legal title her mother Anita L. Maloney.

Two, a wrongful contempt charge brought against Petitioner, in 1987, with paperwork (amended complaint) back-dated to 1983; however, this paperwork was not produced until 1987 and was done without proper jurisdiction of the court.

The Petitioner has been deprived of her civil rights under the Constitution as a result of the court concealing the wrongs perpetrated against the Petitioner even though she has full documentation to prove otherwise.

To date, the disputed title issue has not been dealt with in a court of competent jurisdiction and through no fault of the Petitioner. Wherein lies the problem and the reason for the improper procedures that have taken place throughout this instant matter. If proper legal procedure had been followed, then the issue of disputed title would have been cleared and a formal judgment ordered from a court of competent jurisdiction before all else.

Before:

1. The wrongful seizure by defendant Salafia.

2. The two erroneous judgements one of contempt and one of invalid lien both done without proper jurisdiction. Fraudulent papers (Amended Complaint back dated to 1983) were used to obtain these two erroneous judgments.

3. The altering of court records, done to cover up the disputed title issue.

4. The statement by the Court of Appeals judge to the Petitioner, "you do not want us to go back and clean all this up do you?"

State officials (defendants Horwitz, Horgan) in the instant matter were informed of the improper procedures being committed in the courts, and they choose to ignore these wrongs. These State officials had sufficient knowledge of the

creation of alleged Constitutional deprivation affecting the petitioner, and they failed to provide the petitioner with services extended to others. The denial of such services is claimed to have had no rational basis and thus violates the equal protection clause contributing to the deprivation of the Petitioners right of due process in the courts thus causing an obstruction of justice of equal protection in this instant matter.

It was in 1990, while the Petitioner was attempting to remedy the wrongful court proceedings, when the fraudulent seizure by sheriff Salafia was revealed. The attorneys revealed the fraud in their writings of 1990. They stated that they

never sent a sheriff to seize said property, and this accounted for there being no record of return of process in the courts. The attorneys also charged in their writings of 1990 that the then defendant, now Petitioner, merely vacated her home of thirty some years. The Petitioner claims this to be untrue.

A question of law regarding whether a surviving heir at law is entitled to right of due process and equal protection where disputed title to said property is left unresolved and the question of whether a sheriff can seize property without acting under a proper color of law. The reason given by the court for the dismissal of the instant action is time-barred. This reasoning is truly in

error in that the court based its decision on an assumption rather than fact. An assumption that the Petitioner conceded to know of the deprivation in 1987. This is simply untrue. The Petitioner had no knowledge of the wrong by Defendant Salafia until 1990. Not until 1990 was the fraudulent concealment of a cause of action revealed, and this has been clearly proven in the instant matter thus tolling the Statute of Limitation.

The Petitioner claims that the <u>early dismissal of the instant action at the pleading stage goes against all material authority already precedented in the courts</u>.

It is this rationale (an order by the

court based on assumption, rather than fact or law, and the denial of Petitioner's discovery rights), which acted to deny Susan H. Maloney her property in violation of her due process rights under the Fourteenth Amendment, and the court's upholding of the trial court's erroneous dismissal of the action upon which Petitioner bases this appeal for writ of certiorari.

REASONS FOR GRANTING THE WRIT

The deprivation by defendant Salafia was not revealed until 1990. Petitioner could not take action until such time of discovery, and she is now being penalized by the Court of Appeals for exercising her rights guaranteed under the Constitution of the United States,

Amendment XIV, Section 1:

> No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive an person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The court of Appeals affirmed a dismissal of the instant action that should have been decided in favor of Petitioner based on the decisions of the great majority of the courts who have passed on this particular issue.

The reason given by the Court of Appeals for affirming the dismissal is that the court believes, without any proof, that the Petitioner had prior knowledge of the deprivation before 1990. For the court to come to this conclusion,

it would have to have conclusive evidence proving that the appellant knew of the conspiracy by the sheriff and others in 1987. With this wrongful assumption by the court, the action was dismissed at the pleading stage as time-barred. For the Court of Appeals to assert that Petitioner should have known that a fraud was being committed against her by defendant Salafia is opposed to basic guaranteed rights. To be penalized for insisting on having a disputed matter litigated by a court of law places a "chilling effect" on one rights guaranteed by Amendment XIV, Section 1 of the Constitution.

> No state shall make or enforce any law which shall abridge the privileges or immunities of the

> citizens of the United States; nor shall any state deprive an person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Court of Appeals order affirming the dismissal against all defendants is clearly erroneous in that the judicial opinion bears little relationship to the facts of the case that has been filed and seemingly omits or makes disingenuous use of material authority. The court's order contradicts correct legal principles set forth in previous recent decisions as:

Escalera v. New York City Housing Authority, Cite as 425 F.2d 853 (1970).
1. Courts 406.5 (4)

> Where complaints are dismissed at pleadings stage on motions to dismiss, Court of Appeals must accept allegations in complaints and supporting affidavits as true.

2. Federal Civil Procedure 1781 Action, especially under Civil Rights Act, should not be dismissed at pleadings stage unless it appears to a certainty that plaintiffs are entitled to no relief under any state of facts which could be proved in support of their claims. 28 U.S.C.A. 1443 (3).

The court's order has the effect of erasing the binding dicta set forth in:

Schever v. Rhodes, 416 U.S. 232, 236, 94 S. CT 1683, 1686, 40 L.Ed2d 80 (1957);

Dismissal is proper only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief".

The Court of Appeals asserts the Petitioner conceded to know of the deprivation by defendant Salafia in 1987. The Petitioner states this is simply untrue. The Petitioner's brief may have been inarticulately stated but does not give rise to facts which would support

the court's erroneous assumption.

Gardner v. Toilet Goods Association, 387 U.S. 167, 87 S. CT 1526, 18 L.Ed.2d 704 (1967).

Particularly when an action is brought under the Civil Rights Act, we are chary of permitting dismissal where plaintiffs might obtain relief on facts suggested, but inarticulately stated, by the complaint.

Dioguardi v. Durning, Collector of Customs, Port of New York. No. 157. Circuit Court of appeals, Second Circuit. Jan. 3, (1944). 1. Courts 347 (2), 3511.2

Under the Federal Rules there is no pleading requirement of stating facts sufficient to constitute a cause of action, but only that there be a short and plain statement of the claim showing that pleader is entitled to relief, and the motion for dismissal is for failure to state a claim upon which relief can be granted. Federal Rules of Civil Procedure, rules 8(a), 12(b), 28 U.S.C.A. following section 723c.

At oral argument when the petitioner was asked by the court as to what she

knew in 1987, she clearly stated that she was not aware of the deprivation done unto her until 1990. Petitioner stated that in 1987 she knew only of supposedly lost papers and that she contacted both the court and defendant Salafia at that time (1987) concerning no return of process by Salafia and the answer by both parties to the Petitioner was that the papers were merely lost. Supposedly lost papers does not give rise to a cause of action. If anything it only hints at possible negligence, and the placement of blame is amorphous. In 1987, one would be at a loss as to who to file an action against. The court, a clerk, the sheriff? The responsibility for lost

papers is at best vague. There was no action against defendant Salafia in 1987 by the Petitioner because she had no knowledge of the deprivation of her personal rights. In 1987, allegations made against defendant Salafia would have been only supposition. There was no cause of action until 1990.

Thomas R. Marua v. Charles A. Phillips; 139 Conn. 79 June, 1952.

Where a claim for damages is based upon fraud, the mere allegation that a fraud has been perpetrated is insufficient; the specific acts relied upon must be set forth in the complaint.

The complaint in the present case of 1990 has met the test of **Maruca v. Phillips,** which it would not have done in 1987, with only an allegation of lost papers. It was in 1990 that the silence was

broken concerning the fraudulent seizure by sheriff Salafia. In 1990, the attorneys revealed that they never sent a sheriff to seize said property, and, in fact, they claim that the Petitioner merely vacated her home of thirty some years. At least this was the explanation given in 1990 by the attorneys to state officers for there being no return of process in the courts. If the attorneys did not send the sheriff who did? Actually, if the attorneys had never put in writing that they never sent a sheriff to do a seizure of said property, the Petitioner would not even to this day know about the conspiracy involving the sheriff. The fraudulent concealment of a cause of action tolled the statute of

limitations for this instant case and is thus not time-barred.

Jeremiah Lynch vs. Hiram L. Hall. April Term, 1874.

When fraud is clearly proved it should never be allowed to shield itself behind defenses that are purely technical, unless the technical difficulty is insuperable.

Where fraud is clearly proven in the instant case and where disputed title to said property is still unresolved dismissal of this case without any merits ever being allowed before the courts is clearly unjust and in error. The Court's denial of the appellant's right of discovery is also a grave injustice. The reason for the court not allowing discovery in the instant matter is that it would be to burdensome on defendant

Salafia. It is ludicrous to believe that the sheriff should not have to answer for his actions as to what he did or did not do concerning the seizure of 60 Park Place, Meriden, Connecticut.

Wade v. Johnson Controls. Inc., Cite as 693 F.2d 19 (1982)

Federal Civil Procedure 1773 Dismissal of complaint before discovery is a device that must not be employed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief.

(3,4) Dismissal of a complaint before discovery is a drastic step. It is a device that must not be employed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." Schever v. Rhodes, 416 U.S.232, 236, 94 S.Ct 1683, 1686, 40 L.Ed2d 80 (1957);

The seizure of property known as 60 Park Place, Meriden, Connecticut,

performed by sheriff Salafia on January 4, 1984, is illegal in that it was done without a proper judgment from a court of competent jurisdiction. The illegality of the seizure is the likely cause of why there was no proper return made to the court.

Cutler v. Wadsworth, June 1882

An execution, unsupported, by the judgment, which it counts on, is void; and the officer to whom it is committed, is under no legal obligation to execute it.

The court should remain mystified as to who to believe. Should the court believe defendant Salafia who claims he did a proper return of process or the attorneys who claim they never sent a sheriff to seize said property. Either the sheriff or the attorneys or both have come before

the court with Unclean Hands.

UNCLEAN HANDS DOCTRINE.

Principle that one who has unclean hands is not entitled to relief in equity. Doctrine means no more than that one who has defrauded his adversary in the subject matter of the action will not be heard to assert right in equity. The doctrine has no application unless party's wrongdoing has some proximate relation to the subject matter in controversy.

The fact is that defendant Salafia did seize said property and did cause great harm to the Petitioner. This is witnessed. Only the Petitioner has acted in good faith through out this whole matter.

Foulkrod v. Keet, TC-58, 2 CSCR 745, McDonald, 6-25-87, Sheriff executing summary process judgment is not immune from liability for negligence.

The court denied summary judgment. A court order to evict, it said, does not immunize the sheriff from liability for

negligence or assault. This differentiates the case from a claim of liability resulting solely from the fact that a sheriff has executed on a judgment which later proves to be invalid. Quoting from a 1932 Supreme Court decision, the court concluded that an officer may not, in the exercise of his duty, impose "unreasonable or illegal hardship or loss."

Stevens v. County of Dutchess, N.Y. Cite as 445 F.Supp 89 (1977)
1. Federal Civil Procedure 1788.5

To secure dismissal of civil rights complaint, defendant county sheriff had to show beyond doubt that plaintiff could prove no set of facts in support of his claim that would entitle him to relief. 42 U.S.C.A. 1983; Fed. Rules Civ. Proc. rule 12(b) U.S.C.A.

The only defense on the part of defendant Salafia and the County Sheriffs Department is that the Petitioner is beyond the Statute of Limitations. This defense is in error in that defendant Salafia and the county sheriffs agency is

still to this day silent as to this fraud upon the Petitioner. This weak defense of time-barred does not deny any of the wrongs claimed by the Petitioner in her complaint concerning the illegal seizure of said property. The defense of time-barred is in error and should not be allowed to be used as a shield.

Jeremiah Lynch vs. Hiram L. Hall.
April Term, 1874.

When fraud is clearly proved it should never be allowed to shield itself behind defenses that are purely technical, unless the technical difficulty is insuperable.

Petitioner again states that the Statute of Limitations in the instant action is tolled where there is a fraudulent concealment of the cause of action. Until 1990, the Petitioner was only aware

of supposedly lost papers. This tells of possible negligence but does not even hint at the possibility of illegality. The Petitioner contends that the statute of limitations did not start until 1990, and that the statute of limitations runs for as long as the conspiracy continues and is a danger. The Petitioner claims there is danger as long as the Petitioner is illegally kept from her legal and rightful home and as long as the wrongful contempt order is running.

§52-595. Fraudulent concealment of cause of action.

If any person, liable to an action by another, fraudulently conceals from him the existence of the cause of such action, such cause of action shall be deemed to accrue against such person so liable therefore at the time when the person entitled to sue thereon first discover its existence. (1949 Rev., 8335.)

The public officials involved in the obstruction of justice in this instant matter were fully informed and made aware of the wrongs which are preventing the Petitioner from obtaining her Constitutional right of due process in the Courts. Petitioner was denied the opportunity to have the allegedly altered tapes analyzed. <u>These are public records to which the public is not permitted access.</u>

The defendants being fully aware of the disputed title to said property and unable to produce a formal judgment from a court of competent jurisdiction owed a duty to the Petitioner to bring forth the truth and not to cause any further

deprivation of the Petitioner's Constitutional rights of due process and equal protection. Said defendants (Horwitz and Horgan) have both acted in their official and individual capacities recklessly, with deliberate indifference, and/or intentionally to deprive the Petitioner of her property and her liberty interest.

Mihalcik v. Lensink, Cite as 732 F.Supp. 299 (D.Conn. 1990) Dorsey, District Judge.

Personal involvement can be shown: (1) by direct participation in the alleged deprivation; (2) by failing to remedy a violation after learning of it; (3) by creating an unconstitutional policy, practices or custom or allowing such to continue; or (4) by being grossly negligent in managing subordinates who caused the unlawful condition or event. Williams, 782 F.2d at 323-24 (citation omitted)

The question as to whether or not defendants (Horgan and Horwitz) are protected from being held personally responsible for action committed in their official capacity has been resolved.

Barbara Hafer, Petitioner v. James C. Melo, Jr., ET Al. No. 90-681. Argued October 15, 1991-Decided November 5, 1991.

Held: State officers may be held personally liable for damages under 1983 based upon actions taken in their official capacities.

(c) The Eleventh Amendment does not bar 1983 personal-capacity suits against state officials in federal court. Id., at 237, 238.

In Will v. Michigan Dept. of State Police, 491 U.S. 58 (1989), we held that state officials "acting in their official capacities" are outside the class of "persons" subject to liability under 42 U.S.C. 1983. 491 U.S., at 71. Petitioner takes this language to mean that 1983 does not authorize suits against state officers for damages

arising from official acts. We reject this reading of Will and hold that state officials sued in their individual capacities are "persons" for purposes of 1983.

The reason given by the court for the dismissal against defendants Horwitz and Horgan was for failure to state a claim upon which relief can be granted. This is in error. Petitioner claims relief can be granted in that these public officials (defendants) of the State of Connecticut can be made to do their job properly. By their failure to properly perform their duties and extend the same privileges to all citizens of the State of Connecticut, they have violated state law and have denied to the Petitioner her rights of due process and equal protection regarding the Petitioner's

property and liberty interest.

State of Connecticut Statute Sec. 47-1. Land and Land Titles.

Sec. 47-1. Fee simple an absolute property. Colonial grants valid. Each proprietor in fee simple of lands has an absolute and direct dominion and property in the same, and all patents and grants of lands from the general assembly of the colony of Connecticut, pursuant to the charter of Charles II, shall be sufficient evidence of a title in fee simple to the grantees, their heirs, successors and assigns forever.

This travesty of justice in the instant matter has created a serious cloud of doubt which to this day hovers ominously over the state of Connecticut's judicial system.

And the obstruction of justice by all defendants in the instant action can not be allowed to continue.

Ryland v. Shapiro, Cite as 708 F.2d 967 (1983)

[3,4] The right of access to the courts is basic to our system of government, and it is well established today that it is one of the fundamental rights protected by the Constitution. In **Chambers v. Baltimore & Ohio Railroad**, 207 U.S. 142, 28 S.Ct. 34, 52 1.Ed. 1432 (1907)

> The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each state to the citizens of all other states to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend upon comity between the states, but is granted and protected by the Federal Constitution.

Crews v. Petrosky, 509 F.Supp. at 1204

("An allegation that a clerk of state court has negligently delayed the filing of a petition for appeal, and that the delay has interfered with an individual's right of access to the courts, may state a cause of action under 42 U.S.C. $1983.")

[6] In conclusion, it is clear that,

under our Constitution, the right of access to the courts is guaranteed and protected from unlawful interference and deprivations by the state, and only compelling state interests will justify such intrusions.

It is essential that this Court exercise its power of supervision to halt this continuing saga of inequity and help bring justice and dignity to the Petitioner and to the State of Connecticut. By so doing, this Court will undo the violation to the Petitioner's United States Constitutional rights, it will acknowledge the laws already established by the Court in direct point to this case previously ignored by the Court of Appeals, and the statutory law of the State of Connecticut unjustifiably circumvented by the Court of Appeals with prejudice.

CONCLUSION

The Second Circuit erred in Affirming "early dismissal" which is inconsistent with material authority already before the United States Courts of Appeal and has so far departed from the accepted and usual course of judicial proceedings that it calls for an exercise of this courts power of supervision.

It is respectfully submitted that for the foregoing reasons this petition for a writ of certiorari should be granted to review the judgment of the Second Circuit Court of Appeals and that reversal is appropriate.

Respectfully submitted,
Susan H. Maloney
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Middlefield , CT 06455

APPENDIX

App. A

UNITED STATES DISTRICT COURT DISTRICT OF CONNECTICUT

SUSAN H. MALONEY	)	
VS.	)	N-90-484 PCD
JOSEPH SALAFIA, ET AL	)	

JUDGMENT

The action having come on for consideration of the defendants' motion to dismiss before the Honorable Peter C. Dorsey, United States District Judge, and

The Court having considered the full record of the case including applicable principles of law, and the Court having filed its Ruling and Order, Granting and the motion,

It is accordingly ORDERED, ADJUDGED and DECREED that judgment be and is hereby entered dismissing the complaint.

Dated at Hartford, Connecticut this 6th day of December 1991.

KEVIN F. ROWE, Clerk

by_____
Dennis P. Iavarone
Deputy in Charge

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 30th day of June one thousand nine hundred and ninety-two.

Present:
Hon James L. Oakes,
Chief Judege,
Hon. Joseph M. McLaughlin,
Hon. Donald P. Lay, *
Circuit Judges

Susan H. Maloney,
Plaintiff-Appellant,

v.

92-7154

Joseph Salafia, individually and in his official capacity as Deputy Sheriff;

Middlesex County Sheriff's Department; Daniel B. Horwitch, individually and in his official capacity as Statewide Bar Counsel; Maureen Horgan, individually and in her official capacity; and the State of Connecticut, Defendants-Appellees.

O R D E R

Susan H. Maloney, pro se, appeals from a judgment of the United States District Court for the District of Connecticut, Peter C. Dorsey, Judge, Dismissing her complaint against a deputy

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*The Honorable Donald P. Lay, Senior Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

Docket No. 92-7154

sheriff, a sheriff's department, the

Statewide Bar Counsel, a court transcript services manager, and the State of Connecticut. For the reasons set forth below, we affirm.

Maloney's civil rights claims against Deputy Sheriff Joseph Salafia, the sheriff's department, and the state based on her ejectment from her home on January 4, 1984 are barred by the statute of limitations. Actions brought pursuant to 42 U.S.C. $1983 (1988) are governed by Connecticut's three-year statute of limitations for tort actions, Conn. Gen. Stat. $52-577 (1958). Williams v. Walsh, 558 F.2d 667, 670 & n.3 (2d Cir. 1977). Maloney filed this lawsuit on September 13, 1990, more than six years after the event.

Maloney claims that her action is timely because the statute of limitations was tolled by defendants' fraudulent concealment of the cause of action. State tolling provisions are borrowed in federal court. See Keating v. Carey, 706 F.2d 377, 382 (2d Cir. 1983). A Connecticut statute tolls the statute of limitations for fraudulent concealment:

> If any person, liable to an action by another, fraudulently conceals from him the existence of the cause of such action, such cause of action shall be deemed to accrue against such person so liable therefor at the time when the person entitled to sue thereon first discovers its existence.

Conn. Gen. Stat. $ 52-595 (1958). See also Keating, 706 F.2d 382 (Under federal law, cause of action accrues when plaintiff knew or should have known of injury; equitable tolling delays accrual

for defendant's fraudulent concealment until plaintiff

Docket No. 92-7154

discovers, or until a reasonably diligent plaintiff would discover, the cause of action.)

At least by August 1987, however, Maloney knew of the alleged conspiracy that gave rise to her cause of action. She conceded in her complaint that she first became aware of the alleged conspiracy in August 1987, and that her knowledge was "confirmed in January 1990. Moreover, she knew enough in August 1987 to file an attorney grievance premised on her alleged wrongful ejectment. Thus, even giving Maloney the benefit of tolling, more than three years passed

between accrual and the filing of her complaint.

Insofar as Maloney asserts claims based on post-1987 events against Maureen Horgan and Daniel Horwitch in their official capacities as manager of court transcript services and as State Bar Counsel, the Claims are barred by the Eleventh Amendment and by the limiting term "person" in section 1983. See Will v. Michigan Dep't of State Police, 491 U.S. 58, 71 & n.10 (1989); Yorktown Medical Laboratory, Inc. v. Perales, 948 F.2d 84, 87 & n.1 (2d Cir. 1991). To the extent she asserts claims against Horgan and Horwitch in their individual capacities, the claims are not so barred, see Hafer v. Melo, 112 S. Ct. 358, 361-62

(1991); Yorktown Medical, 948 F.2d at 88, but were properly dismissed for failure to state a claim upon which relief can be granted. As the district court explained, "plaintiff has not alleged in what way either of these defendants deprived her of a

federally protected right. At most, she accuses them of performing their jobs negligently...." Because Maloney accuses Horwitch and Horgan only of negligent failure to take what she considered appropriate action on her complaints, and does not allege that their conduct violated any "constitutional rights of which a reasonable person would have

known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982), her claims against then were properly dismissed. We fine Maloney's remaining arguments to be without merit.

We deny defendant Salafia's request for sanctions against Maloney.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court be and it hereby is AFFIRMED.

JAMES L. OAKES, CHIEF JUDGE

JOSEPH M. McLAUGHLIN, Circuit Judge

DONALD P. LAY, Circuit Judge

office stamp here - This case is not to be made public

App. C
Stamp Here

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the ninth day of September thousand nine hundred and ninety-two.

SUSAN H. MALONEY,

Plaintiff-Appellant,

v.

Docket Numbers. 92-7154

JOSEPH SALAFIA individual and in his official capacity as Deputy Sheriff; MIDDLESEX COUNTY SHERIFF'S DEPARTMENT; DANIEL B. HORWITCH, individually and in his official capacity as Statewide Bar Counsel; MAUREEN HORGAN individually and

in her official capacity and The State of Connecticut,

Defedendant-Appellee.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by pro se appellant, Susan H. Maloney,

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted the the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH,
Clerk

App. D

UNITED STATES COURT OF APPEALS
Second Circuit
United States Courthouse
Foley Square
New York 10007

ELAINE B. GOLDSMITH
clerk

October 14, 1992

Re: Maloney v. Salafia

Dear Ms. Maloney

Enclosed is your motion for claim for clarification of the court in banc, received in this office on October 8, 1992.

The above referenced appeal was affirmed on June 30, 1992.

A petition for rehearing with a suggestion for rehearing in banc has

already been denied, there is no further review from this court, and the enclosed papers are hereby returned to you.

Very truly yours,
Elaine B. Golsmith,
Clerk
by Robert Rodriquez
Deputy Clerk

Enclosure

App. E

To: Ms. Susan Maloney
From: Attorney Dennis A. Ceneviva
Re: Maloney v. Maloney CV 83-0214271
Date: March 23, 1988

AFFIDAVIT

I, Dennis A. Ceneviva, being duly sworn, hereby depose and say to the best of my knowledge that:

1. The above matter was an ejectment action raising the issued of dispossessing the defendant from the property involved in said matter;

2. Title to the involved property was not stipulated to by the parties, but rather plaintiff introduced probate documents in order to attempt to establish his superior right of possession;

3. Said action did not address any issue of fraud, either on the part of the Probate Court, the plaintiff, or the defendant;

4. I did not have in my file any copy of an "Amended Complaint" when I turned over its contents to the defendant in 1983, nor do I have any current independent recollection that such an amendment was known to me before Trial of said matter;

Dennis A. Ceneviva
Attorney Dennis A. Ceneviva

Sworn and subscribed before me this 24th day of March, 1988.

Deborah M. McDonough
Deborah M. McDonough
Notary Public

CASE NO. 92-1705

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

SUSAN H. MALONEY,

Petitioner

v.

JOSEPH SALAFIA, ET AL

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT JOSEPH SALAFIA (INDIVIDUALLY) IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MICHAEL T. LANDINO, ESQ.
COUNSEL OF RECORD
SHEA & COOK, P.C.
290 PRATT STREET
P.O. BOX 2301
MERIDEN, CT 06450
(203) 634-1444

BEST AVAILABLE COPY

LIBRARY
SUPREME COURT, U.S.
WASHINGTON, D.C. 20543

LIST OF PARTIES TO THE PROCEEDINGS

Susan H. Maloney, Petitioner

Joseph Salafia, individually, Respondent

Joseph Salafia, Deputy Sheriff,
New Haven County Sheriff's
Department, Respondent

State of Connecticut, Middlesex County
Sheriff's Department, Respondent

Daniel B. Horwitch, individually and in
his official capacity as Statewide
Bar Counsel, Respondent

Maureen Hogan, individually and in her
official capacity of Manager of Court
Transcript Services, Respondent

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JURISDICTION

1. Judgment entered by United States Court of Appeals for the Second Circuit June 30, 1992.

2. Petition for Rehearing En Banc denied September 13, 1992.

3. Petition for Writ of Certiorari received by Respondent Salafia, individually, April 30, 1993.

STATEMENT OF CASE

Petitioner, Susan Maloney (hereinafter Petitioner) seeks review of decisions of the United States Court of Appeals for the Second Circuit. Petitioner, as plaintiff in the United States District Court for the District of Connecticut, brought an action against respondents herein, Joseph Salafia in his individual capacity and in his official capacity as a New Haven County deputy sheriff, the State of Connecticut, Middlesex County Sheriff's Department, Daniel Horwitch in his individual capacity and in his official capacity as Connecticut Statewide Bar Counsel, and Maureen Horgan in her individual capacity and in her official capacity as Manager of Connecticut Court Transcript services. Said action was

commenced on September 13, 1990 and the complaint was thereafter amended on February 19, 1991.

Petitioner alleged, in her ambiguous and confusing complaint, her civil rights were violated when she was required to move, pursuant to a court order, from real property, in which she claimed an ownership interest at 60 Park Place in Meriden, Connecticut on January 4, 1984, and she sought damages. Petitioner also sought a declaratory judgment that Salafia, in serving legal process as a deputy sheriff, violated 18 United States Code § 1961 et seq., Connecticut General Statutes § 53-939 et seq., Connecticut General Statutes § 42-110a et seq., and committed fraud, assault and trespass against her. She also sought mandamus relief against

other Respondents.

This action arose in retaliation for an ejectment order entered by the Connecticut Superior Court, Housing Session for the Judicial District of New Haven on September 23, 1983 requiring Petitioner to vacate the above referenced premises. Petitioner stayed said ejectment by obtaining an ex parte injunction on December 1, 1983. Said injunction was dissolved on December 16, 1983.

On December 27, 1983, Respondent Salafia, in his official capacity as deputy sheriff, notified Petitioner she was required to vacate the premises by January 4, 1984. She did vacate the premises sometime thereafter.

Respondent Salafia heard nothing further from Petitioner until process

was served on him more than six years after the alleged incidents occurred.

Respondent Salafia, individually, filed a motion to dismiss Petitioner's complaint, dated June 27, 1991. The trial court, Peter C. Dorsey, Judge, held that: Petitioner's civil rights claims were barred by the Connecticut statute of limitation, Conn. Gen. Stat. § 52-595; Petitioner failed to state a valid RICO claim; Petitioner's request for mandamus relief was not appropriate since Respondent Salafia, individually, was not an officer of the United States; and the state law claims were dismissed because the exercise of pendent jurisdiction was not required. This decision was rendered on December 5, 1991 and judgment entered on December 6, 1991.

In September, 1991, before the trial court dismissed this matter, Petitioner had filed a request for discovery in violation of the Order on Pretrial Deadlines in that it was served more than six months after the filing of the complaint. Respondent Salafia, individually, objected to said request, but said objection was not heard before the ruling on pending motions entered, dismissing said action, on December 5, 1991. Judgment entered thereon on December 6, 1991.

Petitioner eventually filed a notice of appeal on December 21, 1991. On June 30, 1992 the U.S. Court of Appeals for the Second Circuit upheld the trial court's decision. In fact, Petitioner raised no issue on appeal against Respondent Salafia in his

individual capacity. Petitioner's petition for rehearing en banc was denied on September 9, 1992.

Counsel representing Respondent Salafia in his individual capacity received notice of the petition for writ of certiorari on April 30, 1993, more than seven months after her petition for rehearing was denied.

In her petition for writ of certiorari, Petitioner once again raises no issues against Respondent Salafia in his individual capacity. Petitioner has failed to file her petition for writ of certiorari within 90 days of entry of judgment or denial of request for review and has failed to state any valid reasons why review of her petition should be granted.

SUMMARY OF ARGUMENT

1. The Petitioner has raised no issues against Respondent Salafia, individually. Her petition speaks only of actions allegedly taken by Salafia in his official capacity as deputy sheriff in evicting Petitioner from the premises where she was living, for allegedly conspiring to defraud her of her property and for her claimed damages. She has failed to allege that Respondent Salafia, individually, had any responsibilities for any of her alleged injuries or damages. The petition should be denied for this reason.

2. Petitioner has failed to file her petition within 90 days of judgment or date of decision on her petition for rehearing en banc. Judgment entered on June 30, 1992 and said petition for

rehearing en banc was denied on September 13, 1992. Pursuant to Rule 13.3 of the Rules of this court, this petition should not be accepted.

3. Petitioner has set forth no valid reasons for having this court review the decisions below. Petitioner has alleged no conflicts between the decision of the United States Court of Appeals for the Second Circuit and other United States Appellate Courts. She has set forth no grounds showing that the decision of the Appellate Court was in error. Her petition for writ of certiorari should thus be denied.

ARGUMENT

1. THE PETITIONER HAS RAISED NO ISSUES FOR REVIEW AGAINST RESPONDENT JOSEPH SALAFIA, INDIVIDUALLY.

In her STATEMENT OF CASE in her petition for writ of certiorari, the Petitioner makes allegations regarding actions committed by Respondent Salafia in his official capacity as a deputy sheriff. All legal conclusions stated in the remainder of her petition are based on the factual allegations stated above, with Respondent Salafia acting as a deputy sheriff.

Nowhere does she allege any wrong committed by Respondent Salafia, individually.

Since Petitioner has made no allegations of any wrong committed by Respondent Salafia, individually, her

petition for review should be denied against him. In fact, she abandoned any claim against Respondent Salafia, individually by failing to raise any issue against him on appeal. Larkin v. United Ass'n of Journeymen, 338 F.2d 335 (1st Cir. 1964) cert. denied 380 U.S. 975 (1965).

2. PETITIONER HAS FAILED TO FILE THIS PETITION FOR WRIT OF CERTIORARI WITHIN THE TIME ALLOWED BY LAW.

Rule 13 of the rules of the Supreme Court of the United States requires a petitioner to file the petition for writ of certiorari within 90 days of the date of judgment. Judgment in the U.S. Court of Appeals for the Second Circuit entered on June 30, 1992, and said court denied Petitioner's petition for rehearing en banc on September 9, 1992.

Petitioner sought review in this court by filing a petition for writ of certiorari, a copy being received by counsel for Respondent Salafia, individually on April 30, 1993, well over 90 days from the last act by the Court of Appeals. Said petition should be dismissed as it is not timely filed. See, e.g. United States ex rel Coy v. United States, 316 U.S. 342, 346 (1942).

In fact, Petitioner had filed two previous petitions with the clerk of this court, but failed to follow the rules setting forth proper fees and form.

3. THE DECISION OF THE TRIAL COURT, AS UPHELD BY THE COURT OF APPEALS, WAS PROPER.

The United States Court of Appeals held that Petitioner's civil rights

claims against Respondent Salafia, individually were barred by the Connecticut three year statute of limitations for tort actions, Conn. Gen. Stat. § 52-577. See Wilson v. Garcia; 471 U.S. 261 (1985).

Said action was not instituted in District Court until January, 1990, more than six years after the acts occurred that Petitioner claimed harmed her. The Appellate Court correctly reasoned that even if the statute of limitations were tolled pursuant to Conn. Gen. Stat. § 52-595, more than three years passed between accrual and the institution of her action.

Petitioner's Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 et seq. (RICO) claim was dismissed because no predicate

RICO offense, as required by 18 U.S.C. § 1961, was alleged by Petitioner in her complaint, and she also failed to allege that Respondent Salafia, in his individual capacity, was engaged in interstate or foreign commerce as required by 18 U.S.C. § 1962. The Appellate Court correctly upheld this dismissal.

Mandamus relief was denied because Respondent Salafia, individually, is not a federal officer. 28 U.S.C. § 1361.

Petitioner failed to state any reasons in her petition as to why the Appellate Court's decision should be subject to review. The decision was not in conflict with those of other United States Courts of Appeals, and is logically sound and well reasoned. The Petitioner simply waited too long to

file her action, and sought to hold Respondent Salafia, individually, liable for actions for which no prima facie case was alleged.

CONCLUSION

The Petitioner has failed to raise any issues against Respondent Salafia, individually in her confusing and conflicting petition for writ of certiorari. She has failed to file said petition in a timely manner. In addition, she has set forth no valid reasons for this court to review the decision below.

For these reasons, Respondent Salafia, individually, respectfully requests that Susan Maloney's petition for writ of certiorari be denied as against him.

Respectfully submitted,

MICHAEL T. LANDINO, ESQ.
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Brief in Opposition to Petition for Writ of Certiorari by Respondent Joseph Salafia was served by U.S. mail, first class postage prepaid on the following parties on May 26, 1993:

Susan H. Maloney
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Middlefield, CT 06455

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Assistant Attorney General
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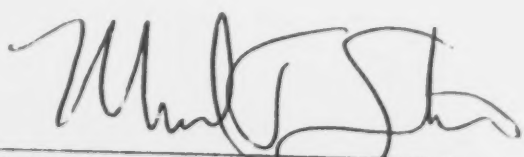
By: 

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Supreme Court, U.S.
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MAY 27 1993
OFFICE OF THE CLERK

No. 92-1705

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

SUSAN H. MALONEY,

Petitioner

versus

JOSEPH SALAFIA, ET AL

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

REPLY BRIEF FOR THE PETITIONER

SUSAN H. MALONEY
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(203) 349 0556

TABLE OF AUTHORITIES CITED

Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, No 91-1657, Argued January 12, 1993, Decided March 3, 1993

Reply Brief

In answer to the brief in opposition a number of points need to be clarified. Due to the shortness of time allowed me to answer, I will list in chronological order these points.

1. The brief in opposition claims that the injunction order of December 1, 1983 was dissolved on December 16, 1983. This is untrue and can be documented. No formal order dissolving said injunction exists and respondent can not produce one.

a. Therefore any action (the ejectment of the petitioner) done with the alleged December 16, 1983 order as a basis in law is improper.

2. On December 27, 1983 respondent, in his individual capacity, notified the petitioner that he would be returning on January 4, 1984 to seize said property.

a. On January 4, 1984, respondent served process upon the petitioner and seized property that day.

b. In 1990, the petitioner received notice during court proceedings that no sheriff had been sent to serve an ejectment order upon the petitioner and that she merely vacated her home. This is untrue, however, if no sheriff was sent then the respondent, who did in fact serve process on January 4, 1984, must have been acting as an individual rather than in his capacity as a county sheriff.

3. The respondent was contacted in the interim concerning the absence of return papers within the court. His response being that they were most likely merely lost, and giving no hint to the petitioner that anything improper had occurred.

4. The petitioner did in fact file her petition within ninety days, it being docketed on December 8, 1992 as No. 92-1705. All documents sent to the Supreme Court were sent to all counsel of record at all times.

5. The decision of the Second Circuit Court of Appeals is improper in that it is based on assumption, rather than fact, as to when the petitioner had knowledge of the deprivation done by respondent

Salafia. The petitioner did not know until 1990 that the respondent acted fraudulently until it was stated by the attorneys that respondent Salafia was never even sent to the premises.

CONCLUSION

The petitioner has raised valid questions as to whether or not the respondent acted in his individual or official capacity. A question which can only be answered it seems through right of discovery. The petitioner has filed in a timely fashion and has kept all parties duly apprised of the progression of this instant case. The petitioner has a valid complaint and has presented valid reasons as to why the decision below

should be reviewed.

There was harmful error in that the petitioner was denied the opportunity and right of discovery and the opportunity to amend the complaint.

To cure any defects in this case it should be remanded back to the Second Circuit for further proceeding consistent with the most recent ruling of March 3, 1993, (Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, No. 91-1657) Page 4205 ?.

Respectfully submitted

Susan H. Maloney
121 Powder Hill Rd
Middlefield , CT 06455

CERTIFICATE OF SERVICE

I hereby certify that a copy of the reply brief to Petition for Writ of Certiorari By Petitioner Susan H. Maloney was served by U.S. mail, first class postage prepaid on the following parties on May 29, 1993:

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